

No. 22,234

IN THE

United States Court of Appeals
For the Ninth Circuit

ADELINE FRASCH,

Appellant,

vs.

THOMAS C. WILSON and SALLY B.

WILSON,

Appellees.

APPELLANT'S REPLY BRIEF

BRADLEY, WAGY, BUNKER, HISLOP & GIBBONS,

By ALBERT M. LEDDY,

2821 H Street,

Bakersfield, California 93301,

Attorneys for Appellant.

FILED

APR 5 1968

WM. B. LUCK, CLERK

Subject Index

	Page
I. Statement of the case	1
II. Summary of argument	2
III. Argument	3

A.

Appellees have failed to answer appellant's argument that the referee had no jurisdiction over the Diedrich and Shrader note in Mrs. Frasch's possession ..	2
---	---

B.

Appellees have failed to answer appellant's argument that the filing of a continuation statement was not required by Section 10102(c) of the Commercial Code of the State of California in order to perfect her interest in the note and trust deed signed by R. A. Diedrich and V. J. Shrader and pledged by the bankrupts	4
---	---

C.

Appellees have answered appellant's argument that Mrs. Frasch is a secured creditor by assuming a set of facts not supported by the record, assuming incorrectly that the burden is on appellant to establish the lack of summary jurisdiction of the Bankruptcy Court, ignoring their pleadings and the findings of fact and conclusions of law, and ignoring the fact that the referee assumed summary jurisdiction without any hearing whatsoever	5
--	---

Table of Authorities Cited

Cases	Pages
Bradley v. St. Louis Terminal Warehouse Co., 189 F.2d 818	5
In re Linda Coal & Supply Co., 255 F.2d 653	6
Kelso v. MacLaven, 122 F.2d 867	5
Matter of Ben Weiss Co., 271 F.2d 234	6

Codes	
Commercial Code:	
Section 10102(c)	2, 4
Rules on Appeal (9th Cir.):	
Rule 18	7
Rule 19	7
Rule 39	7

Texts	
2 Collier on Bankruptcy, 14th Ed., p. 563	5
2 Collier on Bankruptcy, 14th Ed., p. 964	6
4 Collier on Bankruptcy, 14th Ed., p. 487	3
6 Moore's Federal Practice, 2144	6

No. 22,234

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ADELINE FRASCH,

Appellant,

vs.

THOMAS C. WILSON and SALLY B.

WILSON,

Appellees.

APPELLANT'S REPLY BRIEF

I. STATEMENT OF THE CASE

Paragraph 2 on page one of appellees' brief is not supported by the record.

The statement in paragraph 2 on page two of their brief, that "On February 1, 1967 the question of Summary Jurisdiction and the case on its merits were heard, argued and considered by the Court, . . ." is not true. The matter was submitted on the pleadings, which included our objection to the summary jurisdiction of the court. The referee has taken the position that the matter was submitted, and Mr. Mueller, attorney for appellees, took that position in the District Court. We have requested this court to complete

the record by ordering the inclusion of the transcripts of the proceedings before Robert B. Powell, referee, on December 20, 1966, and February 1, 1967, in order to show what actually happened.

The matter was submitted on pleadings which included the statement that Mr. Wilson acted for his wife in depositing the note and trust deed with Mrs. Frasch. (R. 10.)

II. SUMMARY OF ARGUMENT

A.

Appellees have failed to answer appellant's argument that "The referee had no jurisdiction over the Diedrich and Shrader note in Mrs. Frasch's possession. His assumption of jurisdiction was without due process and void. Mrs. Frasch did not consent to his assumption of jurisdiction by not asking for review of this void order."

B.

Appellees have failed to answer appellant's argument that the filing of a continuation statement was not required by Section 10102(c) of the Commercial Code of the State of California in order to perfect her interest in the note and trust deed signed by R. A. Diedrich and V. J. Shrader and pledged by the bankrupts.

C.

Appellees have answered appellant's argument that Mrs. Frasch is a secured creditor by assuming a set of

facts not supported by the record, assuming incorrectly that the burden is on appellant to establish the lack of summary jurisdiction of the bankruptcy court, ignoring their pleadings and the findings of fact and conclusions of law, and ignoring the fact that the referee assumed summary jurisdiction without any hearing whatsoever.

III. ARGUMENT

A.

APPELLEES HAVE FAILED TO ANSWER APPELLANT'S ARGUMENT THAT THE REFEREE HAD NO JURISDICTION OVER THE DIEDRICH AND SHRADER NOTE IN MRS. FRASCH'S POSSESSION.

Appellees first direct the court's attention to the proceeds of the note in the hands of the Trustee at the time he requested the turnover order for the note. Proceeds of the note in the hands of the trustee at the time of the turnover order were never an issue in this case. (R. 2, 3.)

Appellees next cite Collier on Bankruptcy No. 4, 14th Ed. 487, and overlook, do not discuss and do not distinguish the cases cited by appellant in her brief on page 8.

Appellees then grandly ignore the whole issue of due process of law. They neither explain nor excuse their actions of December 20, 1966, which deprived Mrs. Frasch of a fair hearing. They do not answer the argument that a ruling made in the absence of a fair hearing is void.

They then abandon the whole of their attack that culminated in their preparation of "suitable findings of fact and conclusions of law" (R. 24), and like Napoleon fleeing Moscow, leave behind them an untenable shell. Their finding of fact that the order ruling that "this Court has summary jurisdiction to hear and decide this matter" was served on appellant on December 20, 1966 (R. 27), is abandoned in their flight to some imaginary hearing in which there was no evidence that Mrs. Wilson consented to her husband's depositing the note and trust deed as security with Mrs. Frasch. Appellees have fallen from unwitting misrepresentation of the law to disingenuous misrepresentation of the facts. In truth, there was no hearing on December 20, 1966. (R. 26.)

B.

APPELLEES HAVE FAILED TO ANSWER APPELLANT'S ARGUMENT THAT THE FILING OF A CONTINUATION STATEMENT WAS NOT REQUIRED BY SECTION 10102(c) OF THE COMMERCIAL CODE OF THE STATE OF CALIFORNIA IN ORDER TO PERFECT HER INTEREST IN THE NOTE AND TRUST DEED SIGNED BY R. A. DIEDRICH AND V. J. SHRADER AND PLEDGED BY THE BANKRUPTS.

Having now, more than a year after appellant first filed her points and authorities, discovered that Section 10102(c) of the California Commercial Code does *not* require filing of a continuation statement in order to perfect Mrs. Frasch's interest "in the note and trust deed signed by R. A. Diedrich and V. J. Shrader which was collateral security for the note

executed by bankrupt Thomas C. Wilson, . . ." (Conclusion of Law II, R. 27), appellees seek to abandon their conclusion of law and claim that there was no collateral security.

Here appellees fall back on the main theme of their brief. Mrs. Wilson was not shown to have consented to Mr. Wilson's actions. Mrs. Wilson was not a party to the transaction between Mr. Wilson and Mrs. Frasch. Their new position, like their old one, is untenable for several reasons.

C.

APPELLEES HAVE ANSWERED APPELLANT'S ARGUMENT THAT MRS. FRASCH IS A SECURED CREDITOR BY ASSUMING A SET OF FACTS NOT SUPPORTED BY THE RECORD, ASSUMING INCORRECTLY THAT THE BURDEN IS ON APPELLANT TO ESTABLISH THE LACK OF SUMMARY JURISDICTION OF THE BANKRUPTCY COURT, IGNORING THEIR PLEADINGS AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND IGNORING THE FACT THAT THE REFEREE ASSUMED SUMMARY JURISDICTION WITHOUT ANY HEARING WHATSOEVER.

1. No evidence was submitted on which the bankruptcy court could find summary jurisdiction on December 20, 1966. The burden of proof is, first of all, on the trustee to establish the summary jurisdiction of the court.

2 Collier on Bankruptcy 14th Ed. p. 563;
Bradley v. St. Louis Terminal Warehouse Co.,
 189 F.2d 818;
Kelso v. MacLaven, 122 F.2d 867.

2. Contrary to appellees' statement of facts, on February 1, 1967, the matter was submitted on the pleadings; therefore, the pleadings were presumed to be true.

6 Moore's Federal Practice 2144.

These pleadings included the appellant's objection to a summary jurisdiction and a statement that Thomas C. Wilson acted as agent for his wife in pledging the note and trust deed. (R. 10.)

Appellees rely on exhibits attached to the pleadings (page 3, Appellees' Brief) in order to raise this new issue, but decline to abide by their former acquiescence in submitting the matter to Referee Robert B. Powell on the pleadings when it came to the facts in the pleadings.

Raising new issues by referring to part of the pleadings on which the matter was submitted and then reneging on the submission as to other matters is almost as bad as agreeing to give an attorney a continuance and then getting a ruling on an issue in his absence.

3. Appellees are attempting to raise a new issue for the first time on appeal. They raised no such issue in their application. (R. 2.) They prepared no finding of fact or conclusion of law on this issue. Therefore, there is no basis on which they can raise the new issue.

2 Collier on Bankruptcy 14th Ed. p. 964;

Matter of Ben Weiss Co., 271 F.2d 234;

In re Linda Coal & Supply Co., 255 F.2d 653.

4. Finally, appellees fatally ignore the fact that their conduct prevented Mrs. Frasch from having a fair hearing before the order assuming jurisdiction was issued; and, therefore, such order and such assumption of jurisdiction was void.

Dated, Bakersfield, California,
March 29, 1968.

Respectfully submitted,
BRADLEY, WAGY, BUNKER, HISLOP & GIBBONS,
By ALBERT M. LEDDY,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALBERT M. LEDDY,
Attorney for Appellant.

